

AUG 24 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO CANA FERNANDEZ,

Petitioner - Appellant,

v.

E. K. MCDANIEL; BRIAN SANDOVAL,

Respondents - Appellees.

No. 06-15198

D.C. No. CV-04-00997-RLH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Submitted August 21, 2006**

Before: GOODWIN, REINHARDT and BEA, Circuit Judges.

Nevada state prisoner Francisco Cana Fernandez appeals *pro se* from the district court's order denying his motion for reconsideration of its earlier judgment dismissing his habeas petition under 28 U.S.C. § 2254 as untimely. We have

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. §§ 1291 and 2253. We review for abuse of discretion, *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001), and we vacate and remand for further consideration.

In response to the state's motion to dismiss, Fernandez argued that he should receive equitable tolling first on account of "appellate counsel's failure to send him adequate or for that matter any notice that his [d]irect appeal was dismissed" or second on account of the failure of prison officials to forward him his mail when they transferred him to another prison. The district court considered and rejected only the first of these arguments when it dismissed his habeas petition as untimely. Fernandez presented both arguments again in his motion for reconsideration. We conclude that the district court did not abuse its discretion by denying Fernandez's motion as to the first argument. *See* Fed. R. Civ. P. 60(b). But because the record indicates that the district court has not yet considered the second argument, we vacate the district court's denial of Fernandez's motion for reconsideration and remand for the district court to consider that argument. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990) (per curiam) (remanding to the district court to consider an argument raised in a motion for reconsideration in the first instance).

We deny Fernandez's motion for appointment of counsel as moot.

VACATED and REMANDED.